SUPREME COURT, U.S.
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SEP 18 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-300

I. I. ROSEN,

Petitioner,

versus

LINDA N. LAWRENCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK PEEBLES
1006 Baronne Building
305 Baronne Street
New Orleans, Louisiana 70112
Counsel for Petitioner

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The petitioner I. I. Rosen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 25, 1974.

OPINION BELOW

The judgment of the Court of Appeals appears in the Appendix hereto. The judgment was rendered without opinion. The judgment has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 25, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that abortions were illegal under state law and were not considered acceptable among medical practitioners in 1969 may be used at trial to establish medical malpractice which allegedly occurred during an attempted abortion.

2. Whether a federal trial judge may comment upon evidence and conduct the trial in such manner as to reveal his opinion to the jury regarding the ultimate facts of the case.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Linda Lawrence, respondent herein, brought this action in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Dr. I. I. Rosen, petitioner herein, as well as the Sheriff and a Deputy Sheriff of Tangipahoa Parish, Louisiana. Jurisdiction was based upon diversity of citizenship, since Mrs. Lawrence was a citizen of Minnesota and the defendants at trial were citizens of Louisiana. Mrs. Lawrence alleged medical malpractice against Dr. Rosen and negligence against the Sheriff and his Deputy.

At the trial Mrs. Lawrence established, and it was not disputed, that she had been hired by the Sheriff of Tangipahoa Parish and his Deputy to do undercover work in an effort to develop a criminal case against Dr. Rosen for performing abortions in the City of Amite, Louisiana during 1969. Dr. Rosen is a physician in Amite, where he owns a clinic, and during 1969 there were criminal sanctions in Louisiana against performing abortions even during the first trimester of pregnancy.

Pursuant to their plan to obtain evidence against Dr. Rosen, the Sheriff and Mrs. Lawrence arranged to have Mrs. Lawrence pose as a pregnant woman and request an abortion. She did so and presented Dr. Rosen with a urine specimen obtained from a pregnant woman, in order to persuade him that she was in fact pregnant. Dr. Rosen examined her, and later agreed to perform the abortion. Several weeks after

the initial examination, Mrs. Lawrence went to the Rosen Clinic for the abortion procedure. She was administered a sedative, and the abortion procedure began. Shortly thereafter Sheriff's deputies entered Dr. Rosen's clinic, placed him under arrest, and terminated the dilation and curretage procedure which Dr. Rosen was about to begin. Thereafter, Mrs. Lawrence testified, she noticed some spotting of blood and later was examined by a gynecologist who diagnosed a punctured uterus. She spent a week in the hospital for observation and was released. Based upon the foregoing, and for psychological damage which Mrs. Lawrence said she received, the jury below awarded her $10,000.00 in damages. Judgment was rendered against Dr. Rosen, but the Sheriff and his Deputy were found not liable to Mrs. Lawrence for their failure to intervene at a sufficiently early time to prevent her alleged injury. At the trial Dr. Rosen denied any malpractice, denied puncturing Mrs. Lawrence's uterus, and denied any injury to her. After post-trial motions were denied, Dr. Rosen appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the trial court on July 25, 1974, without opinion.

At the trial Mrs. Lawrence's case against Dr. Rosen was based upon the allegation that injury had occurred during an "illegal" abortion. The only illegality alleged was the state criminal sanction against any non-therapeutic abortions, prior to *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, and *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705. The principal medical witness for Mrs. Lawrence was a gynecologist, who testified that a

biopsy of the uterus, such as Dr. Rosen intended to perform, was not in keeping with generally accepted medical practice because it would "run a grave risk of disturbing a normal type pregnancy." (T. 87) A physician who examined Mrs. Lawrence after she left Dr. Rosen's clinic testified, over objection by Dr. Rosen's counsel, to the "illegality" of non-therapeutic abortions in Louisiana in 1969. (T. 90) Counsel for Mrs. Lawrence in final argument used this testimony to establish malpractice:

> "It was illegal, it shouldn't have been done, and in accepted medical practice and procedure, they simply do not do it, and if they do perform a procedure of this kind, for some reason, these two men said they would perform it in a hospital." (T. 293)

The transcript shows that the trial court accepted the theory of the case presented by Mrs. Lawrence that abortions constituted malpractice because an abortion was illegal and not accepted medical practice in Louisiana in 1969. When Dr. Rosen's counsel sought to establish on cross-examination of an opposing witness that Dr. Rosen would not have had time to perforate Mrs. Lawrence's uterus, he asked the witness to assume that Dr. Rosen was under no pressure from the standpoint of time. The Court then interrupted him:

> "THE COURT: Well now, I don't think that question is quite fair, because the doctor [Rosen] admitted on the witness stand that he was performing an illegal operation. How

> can you proceed with a question with regard to something that was being done illegally? *But go ahead; the jury will understand.* You can answer the question. (Emphasis supplied) (T. 200)

On other occasions the trial judge, by his conduct and comment, demonstrated his prejudgment of the ultimate facts of the case in favor of Mrs. Lawrence. Examples:

1. Once, in terminating a line of questioning by Dr. Rosen's counsel, the Court commented, "The evidence is that he [Dr. Rosen] punctured the womb." (T. 151)

2. During the early part of the trial, while Mrs. Lawrence was testifying, the Court sought more detailed information from her regarding the fact that a deputy had told her that he had recovered a fetus from a garbage can outside Dr. Rosen's clinic. (T. 79) When the deputy took the witness stand, the Court brought the subject up again and questioned the deputy about it. (T. 221, 222) When Dr. Rosen's counsel objected, the Court sustained counsel's objection to the Court's own question. (T. 222) The deputy was later questioned by counsel for the Sheriff regarding the finding of the fetus outside Dr. Rosen's clinic. When counsel for Dr. Rosen objected (T. 228), the Court overruled the objection in order to "put this in the proper setting." (T. 229) The apparent purpose of the questioning was to establish that Dr. Rosen had performed abortions prior to the occasion involving Mrs.

Lawrence. The deputy then detailed how he extracted from a garbage can "a soft pouch that was charred and burned," and when he took a look at it, "it was repulsive." He testified about how he contacted his supervisor and the coroner, and obtained instructions as to how to clean it and preserve it, and then proceeded to do so. (T. 230) It is submitted that the record does not reflect any relevance for this testimony, since Dr. Rosen acknowledged from the beginning that he was attempting to perform a procedure on Mrs. Lawrence which would have resulted in a purposeful abortion. The testimony was not relevant to the defense of the Sheriff and Deputy, because their right to investigate matters they believed to be criminal was not in issue at the time. The effect of the testimony was surely to inflame the jury.

3. When Dr. Rosen was called to the witness stand by Mrs. Lawrence's attorney, the trial judge began his own cross-examination of the physician. The Court interrupted counsel's line of questioning to establish that Dr. Rosen did not keep records (T. 167), at least of any abortions in 1969. The Court then examined Dr. Rosen as to how he paid his income tax if he didn't keep records. (T. 168) Later, after the subject had been at rest for some time, the Court brought it up again. (T. 170) The implication that Dr. Rosen must be doing something improper if he didn't keep records could not have been lost on the jury. When the next medical witness for Mrs. Lawrence was testifying on a totally different subject, the Court interrupted:

"THE COURT: Doctor, is it customary for a physician to keep records as to the patients he has treated and what he has found to be ailing them?

THE WITNESS: Yes, sir.

THE COURT: — and the treatment he gave them?

THE WITNESS: Yes, it is.

THE COURT: Go ahead." (T. 185)

It is apparent that the Court knew the answers to the questions he had directed to the witness. He simply assumed the role of the advocate while still on the bench.

Dr. Rosen, while acknowledging that he intended to perform an abortion on Mrs. Lawrence, testified that he was concerned about the possibility of carcinoma and thus intended to take a biopsy of the lining of the uterus from Mrs. Lawrence. The Court's questions on this subject:

"THE COURT: Doctor, is there any other way of doing a biopsy or getting a specimen without doing that whole curettage?" (T. 171)

* * * *

"THE COURT: Doctor, from what you say, any time a doctor performs an abortion, he

can simply say, "I was looking for cancer"; is that the way it is?" (T. 174)

When Dr. Rosen described his nurse as an excellent nurse, the Court interrputed:

"THE COURT: Wait; let's stop right there. Is she a trained nurse?

THE WITNESS: I trained her, sir, myself.

THE COURT: No, I mean, is she a trained nurse in the sense that she's qualified?

THE WITNESS: I would recommend her, sir.

THE COURT: Well, never mind that. I don't want your recommendations. Go ahead." (T. 175)

The entire tenor of the Court's conduct and comments clearly revealed to the jury that the Court felt abortion to be unacceptable conduct on the part of a physician. It is likely that this may have influenced the jury when it decided the issue of liability.

REASONS FOR GRANTING THE WRIT

1. This Court should enforce application of the necessary inferences of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, and *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739.

This Court has held that abortion, during the first trimester of pregnancy, is a right guaranteed by the Constitution. *Roe v. Wade, supra.* This right cannot be limited by state statute during the first trimester and physicians performing such abortions are protected. *Doe v. Bolton, supra.* When Dr. Rosen agreed to perform an abortion on Linda Lawrence in 1969, his action was protected by the Constitution in spite of Louisiana statutes prohibiting abortion. Such was the law when this case was tried before a jury in December, 1973.

At the trial, testimony was introduced to show that abortion was "illegal" under state law and Mrs. Lawrence's leading medical expert testified that biopsy procedures leading to loss of the fetus were not in keeping with generally accepted medical practice. Counsel for Mrs. Lawrence argued in summation that the jury should consider these matters when deciding the issue of malpractice. Additionally, the Court indicated by its conduct and comments that abortion was at least disapproved. It is submitted that under these circumstances a jury verdict favorable to Mrs. Lawrence was effectively coerced. This Court should enforce the intended implementation of the principles of *Doe* and *Roe, supra,* by granting the writ sought in this case.

2. This Court should provide more definite guidelines for a Federal trial Judge's comments upon the evidence.

Federal judges are, of course, clothed with all the common law powers of a trial judge. Among these is the power, denied many state court judges, to comment on the evidence. This Court has held:

> "In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."
>
> *Quercia v. U.S.*, 53 S.Ct. 698, 699, 289 U.S. 466, 469 (1933)

Yet this Court also said, in *Quercia, supra:*

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the

> trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided." (citations omitted) 53 S.Ct. at 699

The foregoing general principles set forth by this Court, from a case decided upon challenged jury instructions, do not set forth sufficient guidelines for comments by trial judges in contexts other than the giving of jury instructions. During the trial of the case in the court below, the trial judge commented on the testimony of witnesses. He interjected questions and lines of questioning which challenged the credibility of one of the parties. It is submitted that there must be "safeguards against abuses," *Quercia, supra,* controlling such comments and conduct by trial judges which have not yet been satisfactorily set forth by this Court. The Court should grant certiorari in this case in order to set proper guidelines to be followed by trial judges in their comments to the jury and their conduct of the trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

JACK PEEBLES
1006 Baronne Building
305 Baronne Street
New Orleans, Louisiana 70112
Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1978
Summary Calendar*

LINDA N. LAWRENCE,
Plaintiff-Appellee,

versus

FRANK M. EDWARDS, JR., ET AL.,
Defendants,

I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 25, 1974)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1973

No. 74-1978
Summary Calendar

D. C. Docket No. CA-70-1840-A

LINDA N. LAWRENCE,
Plaintiff-Appellee,

versus

FRANK M. EDWARDS, JR., et al.,
Defendants,

I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: July 25, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Richard L. Edrington, P.O. Drawer 460, La Place, Louisiana 70068, counsel for the Respondent. I further certify that all parties required to be served have been served.

JACK PEEBLES
1006 Baronne Building
305 Baronne Street
New Orleans, Louisiana 70112
Counsel for Petitioner